

# ARTICLES

## CHINA'S EQUITY JOINT VENTURE LAW: A STANDING INVITATION TO THE WEST FOR FOREIGN INVESTMENT?

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### 1. INTRODUCTION

More than a decade ago, the People's Republic of China (the "PRC" or "China") surprised the world with a new policy of openness towards foreign investment on Chinese soil.<sup>1</sup> This new policy was geared towards "bringing China back into the world's economic mainstream."<sup>2</sup> The attraction of foreign investment to China was a paramount goal in achieving a place for China on the international economic stage. The equity joint venture ("EJV") was one of the first vehicles used to stimulate foreign investment in China and set this new plan of economic reform into motion.<sup>3</sup>

However, China's open arms, outstretched to the West,

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<sup>1</sup> *Report of the Round-Table Organized by the United Nations Centre on Transnational Corporations in co-operation with the Ministry of Foreign Economic Relations and Trade, People's Republic of China, Beijing, 25 and 26 May 1987*, Foreign Direct Investment in the People's Republic of China, 54 (United Nations, 1988) [hereinafter *Round-Table Report*].

<sup>2</sup> Bin Xue Sang & George D. Wilson, *Capital and Technology: China Rejoins the Modern Business World—An Analysis of China's Equity Joint Ventures Law*, 25 U.S.F. L. REV. 511, 511 (1991).

<sup>3</sup> *Id.* This Article will focus on equity joint ventures to the exclusion of contractual or cooperative joint ventures, although the latter type of joint venture is mentioned in section 3, *infra*, in the context of a discussion of other major forms of direct foreign investment in China.

have encountered considerable caution on the part of the foreign investment community. Within a very short period of time, the initial enthusiasm, thought by many to be inducement of a surge of foreign investment into China as the latest investment frontier, began to wane.<sup>4</sup> This occurred because the original equity joint venture law, promulgated in 1979<sup>5</sup> (the "1979 Law" or "JV Law"), was generally regarded as suffering from vagueness and the lack of a complementary domestic legal framework.<sup>6</sup>

Further, the notorious suppression of the democratic movement in China of the Tiananmen Square incident<sup>7</sup> added to the hesitancy of foreign investors. This incident only made them more reluctant to risk their investment dollars in an investment climate aggravated by such political instability.

Foreign investors also understandably questioned how long the Chinese would welcome this new influx of foreign investment. Surely China did not intend to abandon overnight its staunch and notorious reputation for self-reliance, to the point of achieving near total isolation, economic and otherwise, from the rest of the world.<sup>8</sup> To some, the message seemed clear that foreign investment dollars were regarded by the Chinese as a conduit solely for the acceleration of its economic well-being.<sup>9</sup> Indeed, some foreign investors believed that this outward show of tolerance to foreign investment was something that "the Chinese Communist Party will only admit internally . . . [i]s a stage on the road to the inevitable adoption of communism."<sup>10</sup> In short, from the onset of this

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<sup>4</sup> *Round-Table Report*, *supra* note 1, at 62.

<sup>5</sup> The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, *adopted by* The Second Session of the Fifth National People's Congress, July 1, 1979 (effective July 8, 1979), *reprinted in* 18 I.L.M. 1163 (1979) [hereinafter JV Law].

<sup>6</sup> L. Crawford Brickley, Comment, *Equity Joint Ventures in the People's Republic of China: The Promised Land is Not Yet in Sight for Foreign Investors*, 10 U. PA. J. INT'L BUS. L. 257, 259 (1988).

<sup>7</sup> Paul D. McKenzie, *Foreign Exchange and Joint Ventures with China: Short-Term Strategies and Long-Term Prospects*, 17 CAN. BUS. L.J. 114, 145 (1990).

<sup>8</sup> IKE MATHUR & JAI-SHENG CHEN, STRATEGIES FOR JOINT VENTURES IN THE PEOPLE'S REPUBLIC OF CHINA 134 (1987).

<sup>9</sup> *Id.*

<sup>10</sup> NIGEL CAMPBELL, A STRATEGIC GUIDE TO EQUITY JOINT VENTURES IN CHINA 18 (1989).

program that welcomed foreign investors to China, the PRC was and remains a socialist country with a centralized economy as its main economic feature.<sup>11</sup>

The questions of just how long and to what extent capitalistic notions will be tolerated as an overlay upon one of the world's few remaining socialist regimes remain, as yet, unanswered. China's recent tolerance for such notions of the Western world are noteworthy, however, at the very least as a testament to the willingness of China to suppress its xenophobic tendencies<sup>12</sup> in exchange for realizing economic health. And, assuming this culture can co-exist harmoniously with Western business practices, the union in the joint venture setting is arguably a very complementary one. For the Chinese joint venture partner, this enterprise provides a means of obtaining advanced technology, manufacturing goods for export and generating much needed foreign currency.<sup>13</sup> For the Western joint venture partner, China represents one vast, untapped consumer market that is rich in both human and natural resources.<sup>14</sup>

China, in the past several years, has clarified and amended its joint venture law with some frequency.<sup>15</sup> A central thesis of this Article is that the evolution of China's joint venture law

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<sup>11</sup> RICHARD D. ROBINSON, *FOREIGN CAPITAL AND TECHNOLOGY IN CHINA* 10 (1987).

<sup>12</sup> Sang & Wilson, *supra* note 2, at 513. China has long harbored a deep distrust for the Western legal establishment. Steven N. Robinson & George R.A. Doumar, "It Is Better to Enter a Tiger's Mouth Than a Court of Law" or *Dispute Resolution Alternatives in U.S.-China Trade*, 5 DICK. J. INT'L L. 247, 251 (1987). In the 1800s, China sought to eliminate the smuggling of opium into China by British citizens by invoking Western concepts of international law. China's Imperial Commissioner, Lin Tse-hsu, sought to employ legal concepts espoused in Vattel's *The Law of Nations* by writing to Britain's Queen Victoria to enlist her help in restraining her citizens from engaging in illegal trade. China's request to the Queen was answered by the first Opium War, which Britain started and won. This marked a period of extreme humiliation for China, causing it to withdraw from participation in the international economic arena. *Id.* at 250-51.

<sup>13</sup> Lee M. Zeichner, Note, *Chinese Solutions to Legal Problems: Repatriating Business Profits from the People's Republic of China*, 19 LAW & POLY INT'L BUS. 385, 388 (1987), citing Zhang, *Improving Conditions for Joint Ventures*, BEIJING REV., Sept. 1, 1986, at 4.

<sup>14</sup> Lixing Zhang, *The Statutory Framework for Direct Foreign Investment in China*, 4 FLA. INT'L L.J. 289, 290 (1989). China has a population of over one billion people. *Id.*

<sup>15</sup> See *infra* notes 72 and 134 and accompanying text.

has been in the distinct direction of accommodation to the Western investor. Many difficulties still exist, however, for foreign investors in China. And, if China wants to maintain a place on the map as a favorable venue for foreign investment, this evolution must continue in a way that meaningfully addresses the concerns of foreign investors.

Section 2 of this Article examines the cultural backdrop in China against which the current economic reform program operates. It focuses on Chinese ideology and attitude towards law, the program of modernization, and foreign investment as an integral part of that program. The legal framework for equity joint ventures in China is also outlined here. Section 3 explores the other major forms of direct foreign investment in China. It then turns to a detailed discussion of the original joint venture law, the regulations implementing that law and recent amendments to it. Section 4 focuses on the lingering problems that face foreign investors in China, and discusses some possible solutions to these problems.

## 2. ECONOMIC REFORM IN THE PEOPLE'S REPUBLIC OF CHINA

### 2.1. *Chinese Ideology and Attitude Towards Law*

To grasp fully the significance of the economic reform in China, one must understand China's ideology and attitude towards law in the pre-reform era. The two central norms that underlie China's pre-reform ideology are "li" and "fa." The Confucian concept of "li" refers to social standards of conduct necessary to maintain order in society.<sup>16</sup> This concept embodies the notion that positive law is unwarranted because a breach of "li" would result in societal sanction with far graver consequences than any embodied in a penal code. Juxtaposed with the concept of "li" is the legalistic concept of "fa," or law.<sup>17</sup> "Fa" is something of a necessary evil in place to ensure an orderly society. In theory, its impact is reserved only for those so low on the social stratum that the looming threat of being a social outcast is rendered meaningless.

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<sup>16</sup> Alison L. Patrucco, *Equity Joint Ventures with the People's Republic of China: A Puzzle in Politics, Law, and Tradition*, 10 HASTINGS INT'L & COMP. L. REV. 609, 619 (1987).

<sup>17</sup> *Id.*

<https://scholarship.law.upenn.edu/jil/vol14/iss1/1>

Nevertheless, as discussed below, China has demonstrated an outward show of tolerance for a more prominent place for law in its society.

The traditional Chinese abhorrence of law is manifested in their similar dislike for written law.<sup>18</sup> The role of written law in China was one of a backstop; it was resorted to only when the Confucian concepts of propriety in social conduct were ineffective in ensuring proper behavior.<sup>19</sup> The tendency for any legal regime in China, therefore, has been to downplay codified law.<sup>20</sup> The fear, embodied in Confucian philosophy, is that a society whose orderly functioning is "propped up" by written law is a society vulnerable to crumble, should that written law ever become inoperative.<sup>21</sup>

Against this backdrop, it is all the more dramatic that China, since 1979, engaged in a frenzy of codification of a new legal regime designed to attract the foreign investor to its soil. Swallowing hard, China has placed a new emphasis on restructuring its legal system, passing new economic laws and regulations, and amending both.<sup>22</sup> The crux of these new laws was to create a secure investment environment, complete with legal protections for the foreign investor.<sup>23</sup> This flurry of legislative activity was all in the hopes of signalling to the international investment community that China is not only amenable to the influx of capitalism inside its borders, but that it also provides a stable investment environment. After all, so the Chinese seem to think, more codification, and amendments to what has been codified, translates into more certainty built into the legal regime.

No bright line exists, however, between the pre-reform and post-reform eras and, in fact, the traditional ideology and attitude towards law has not truly changed in the post-reform era. Indeed, it would be naive to believe that the traditional

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<sup>18</sup> Wil Armstrong, Comment, *The Development of Commercial Law for Foreign Investment in China*, 12 HOUS. J. INT'L L. 55, 55 (1989).

<sup>19</sup> *Id.*

<sup>20</sup> See Eileen Golden, Recent Development, *People's Republic of China—1983 Joint Venture Implementing Regulations—The Supplement of Detail, In An Attempt to Attract Foreign Investment*, 15 GA. J. INT'L & COMP. L. 389, 393 (1985).

<sup>21</sup> *Id.*

<sup>22</sup> Zhang, *supra* note 14, at 291.

<sup>23</sup> *Id.* at 295.

emphasis on unwritten, accepted norms governing behavior in society are now forgotten in this era of economic reform in China. More realistically, these new paper laws are an accommodation designed to attract the foreign investor.

It is questionable just to what extent these laws can be integrated into a legal regime whose distinguishing feature is marked by utter disdain for them. A healthy dose of caution would be indicated for the Western investor, then, when contemplating a joint venture in China. In one sense, this new economic scheme in China parallels the notion that "li" is solely for those who occupy a higher plain in Chinese society, for whom the fear of social sanction is enough. The concept of "li" is not directed towards foreigners. "Fa," however, is reserved for those not so socially enlightened, including the foreign investor. Similarly, this mass codification seems to be reserved for, and directed towards, the foreign investor and not the Chinese national, for whom written law is less necessary to govern conduct.<sup>24</sup>

## 2.2. *The Need for Foreign Investment as a Catalyst for Economic Reform*

Since the People's Republic of China was founded, it has emphasized the goal of self-reliance as a society.<sup>25</sup> The Chinese soon realized, however, that to rely on their own resources and remain at their then-technological stage of development posed the surest formula for economic stagnation. China, as a nation, began to realize that its quest for economic development could be accelerated through a tolerance of, and indeed, economic union with, foreign enterprises.<sup>26</sup> The decision had to be made to sacrifice the virtues of independence so jealously guarded by the Chinese for the sake of achieving economic prosperity.

In the late 1970's, China embarked on a new program of economic reform designed to bolster the domestic economy, in

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<sup>24</sup> See Richard E. Pelosi, Jr., Note, *A Comparison of Joint Ventures in the People's Republic of China and Japan*, 10 N.Y.L. SCH. J. INT'L & COMP. L. 95, 97 (1989) (citing RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 478-80 (2d ed. 1978)).

<sup>25</sup> MATHUR & CHEN, *supra* note 8, at 134.

<sup>26</sup> *Id.*

large part, by stimulating foreign investment and trade.<sup>27</sup> This program, the so-called "open door" policy,<sup>28</sup> was an invitation for foreign investors to see China in a new light and as *the* new international business venue. One aspect of this open door policy is the program known as the Four Modernizations, which focuses on the areas of agriculture, industry, science and technology, and defense.<sup>29</sup> The goal of the Four Modernizations movement was to transform China into an industrialized nation by the year 2000.<sup>30</sup>

In addition, this new era of reform was to be marked by what is known as the principle of "equality and mutual benefit."<sup>31</sup> China's new open door policy would be one to display remarkable tolerance for that which is in many ways antithetical to its socialist system, but it would insist upon being treated on an equal basis with that of its new economic partners.

In light of China's new open door policy, a necessary evil was tolerance by this socialist nation of capitalistic notions formerly nothing short of repugnant to it. In the name of economic progress, China repressed its xenophobia<sup>32</sup> and extended a welcoming arm to the West. The compatibility of capitalistic notions with this socialist regime is still an open question. Thus, one cannot help but wonder how long that welcoming arm will be extended if one regime cannot truly be integrated into the other. At least for the time being, however, ideology has given way to practicality and the traditional dogma of socialism has softened somewhat to make room for capitalistic vehicles that will put China on the proverbial economic map. As the saying goes, "white cat, black cat, whichever catches mice is a good cat."<sup>33</sup>

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<sup>27</sup> Armstrong, *supra* note 18, at 56.

<sup>28</sup> CAMPBELL, *supra* note 10, at 1.

<sup>29</sup> MATHUR & CHEN, *supra* note 8, at 9.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 134.

<sup>32</sup> Sang & Wilson, *supra* note 2, at 513.

<sup>33</sup> *Id.* at 515. The gist of this post-reform expression is that socialism will yield to capitalism, or some combination of the two, to reach the predominant goal of economic prosperity in China. *Id.* at n.11.

### 2.3. *The Legal Framework for Equity Joint Ventures in China*

A cornerstone of the new open door policy in China and the first significant piece of legislation promulgated pursuant to this new program of economic reform is the JV Law.<sup>34</sup> The promulgation of this law marked the beginning of a new legal regime which allowed foreigners to conduct business on Chinese soil for the first time.<sup>35</sup>

Equally dramatically, China promulgated in 1982 the fourth constitution of the PRC (the "1982 Constitution") which promises constitutional protection for direct foreign investment in China.<sup>36</sup> Article 18 of the 1982 Constitution was fashioned to alleviate the fear and uncertainty of foreign investors that their business endeavors would go unprotected.<sup>37</sup> It states:

The People's Republic of China permits foreign enterprises, other foreign economic organizations, and individual foreigners to invest in China and to enter into various forms of economic cooperation with Chinese enterprises and other economic organizations in accordance with the law of the People's Republic of China.

All foreign enterprises and other foreign economic organizations in China, as well as joint ventures with Chinese and foreign investment located in China, shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China.<sup>38</sup>

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<sup>34</sup> A.J. Easson, *Contractual, Co-operative and Equity Joint Ventures in the People's Republic of China*, 3 REV. INT'L BUS. L. 145, 146-47 (1989). JV Law, *supra* note 5.

<sup>35</sup> This Article will discuss this legal regime in greater detail. See *infra* notes 73-133 and accompanying text.

<sup>36</sup> James V. Feinerman, *Chinese Law Relating to Foreign Investment and Trade: The Decade of Reform in Retrospect*, in 2 CHINA'S ECONOMIC DILEMMAS IN THE 1990S: THE PROBLEMS OF REFORMS, MODERNIZATION, AND INTERDEPENDENCE 828, 829-30 (Study Papers Submitted to the Joint Economic Committee, Congress of the United States, 102d Cong., 1st Sess.) (John P. Hardt & Richard F. Kaufman eds., Apr. 1991). See also *The Constitution of the People's Republic of China, adopted by The Fifth Session of the Fifth National People's Congress, Dec. 4, 1982* [hereinafter 1982 Constitution].

<sup>37</sup> Feinerman, *supra* note 36, at 829-30.

<sup>38</sup> 1982 Constitution, *supra* note 36, art. 18.



The plain language of this provision indicates that the rights and interests of foreign investors will be protected in China. As revealed below, this plain language may be at odds with the real protections afforded foreign investors in China.

However, the 1982 Constitution is the PRC's fourth constitution, and the Chinese do not downplay the importance of its extension to foreign investors of various protections. Of course, Article 18 makes explicit that the protection it extends to foreigners investing in China depends ultimately on the laws of the PRC.<sup>39</sup>

In addition to the 1979 Law and the 1982 Constitution, China has enacted a series of other laws supporting its new program aimed at attracting foreign investment. First, in 1985, the Foreign Economic Contract Law (the "Contract Law") became effective, superseding a 1982 statute.<sup>40</sup> The Contract Law governs the legal relationship between Chinese organizations and foreign organizations and individuals. It does not govern contractual relations of Chinese individuals.<sup>41</sup> In addition, this law provides that "equity joint venture contracts . . . may continue to be valid when new laws are enacted."<sup>42</sup> This aspect of the Contract Law seeks to ensure that existing joint venture contracts will not suffer automatic invalidation with the subsequent promulgation of new laws. Further, while the Contract Law requires that the contract conform to Chinese law, if the contract omits a governing law clause

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<sup>39</sup> *Round-Table Report*, *supra* note 1, at 56.

<sup>40</sup> Rongjie Ma, *China Opens for Business*, CORP. COUNSEL'S INT'L ADVISER, Nov. 1985, at 6-08, 6-11. See also Foreign Economic Contract Law of the People's Republic of China, adopted by The Tenth Session of the Standing Committee of the Sixth National People's Congress, Mar. 21, 1985 (effective July 1, 1985) [hereinafter Foreign Economic Contract Law].

<sup>41</sup> Ma, *supra* note 40, at 6-11. Nevertheless, where the Foreign Economic Contract Law does not apply, or is silent, other international norms and treaties, such as the United Nations Convention on Contracts for International Sale of Goods, 19 I.L.M. 671 (May 1980), govern the contractual relations between both Chinese organizations and individuals and their foreign counterparts. Armstrong, *supra* note 18, at 63 (citing Yan Zhao, *A Comparative Study of the Uniform Commercial Code and the Foreign Economic Contract Law of the People's Republic of China*, 6 INT'L TAX & BUS. LAW. 26, 28 & n.13 (1988)).

<sup>42</sup> Michael J. Moser, "Foreign Investment in China: The Legal Framework," in FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 90, 103 (2d ed. 1987). See also Foreign Economic Contract Law, *supra* note 40, art. 40.

dictating the applicability of Chinese law, international custom and practice govern the contract.<sup>43</sup>

Secondly, China passed the General Principles of Civil Law (the "Civil Code") in 1986. Article 41 of the Civil Code formally conferred the status of "legal persons" on foreign enterprises in China.<sup>44</sup> The status of "legal person" affords an enterprise civil capacity, competency to perform legal acts and the right to independently enjoy civil rights and assume civil duties.<sup>45</sup> The Civil Code also awarded equity joint ventures and other foreign enterprises the status of limited liability companies.<sup>46</sup>

Thirdly, in 1986, the State Council of the PRC promulgated the Provisions for the Encouragement of Foreign Investment

<sup>43</sup> Ma, *supra* note 40, at 6-11.

<sup>44</sup> General Principles of Civil Law of the People's Republic of China, passed by The Fourth Session of the Sixth National People's Congress, Apr. 12, 1986, 1986 *State Council Gazette* 371, translated in English in Whitmore Gray & Henry Ruiheng Zheng, *General Principles of Civil Law of the People's Republic of China*, 34 AM. J. COMP. L. 715 (1986) [hereinafter Civil Code]. Article 41 states:

State-owned and collective enterprises that meet the capital requirements provided by the State, possess a charter, an organizational structure, and premises, and are able to assume civil obligations independently, acquire the status of legal person upon approval and registration by the responsible agency.

Sino-foreign equity joint venture enterprises, Sino-foreign contractual joint venture enterprises and wholly foreign owned enterprises established in the territory of the People's Republic of China that meet the requirements for legal persons acquire the status of Chinese legal persons upon approval and registration in accordance with law by the administrative agencies for industry and commerce.

Civil Code, art. 41.

<sup>45</sup> Civil Code, *supra* note 44, art. 36.

<sup>46</sup> Article 48 states:

A State-owned enterprise legal person bears civil liability to the extent of the property the State has given it to operate and manage. A collective enterprise bears civil liability to the extent of the property the enterprise owns.

Civil liabilities of a collective enterprise shall be satisfied from the assets the enterprise owns. Sino-foreign joint venture enterprise legal persons, Sino-foreign contractual joint venture enterprise legal persons and wholly-foreign-owned enterprise legal persons bear civil liability to the extent of the property the enterprise owns, unless the law provides otherwise.

Civil Code, *supra* note 44, art. 48.

(the "Encouragement Provisions").<sup>47</sup> This set of provisions, as its name suggests, was designed to stimulate foreign investment that declined after the initial interest in investment in China after the promulgation of the 1979 Law. In addition, the Encouragement Provisions were also fashioned to steer foreign investment into high-tech and export industries in China.<sup>48</sup> They target some of the perennial problems that have plagued foreign investors, such as foreign exchange shortages, high start-up costs and bureaucratic delays.<sup>49</sup> Simplified, the Encouragement Provisions embody an incentive package which distinguishes between "export enterprises" and "technologically advanced enterprises" and all other forms of foreign investment.<sup>50</sup> The last category of enterprises does not enjoy the special myriad of benefits enjoyed by the former two types of enterprises.<sup>51</sup>

In sum, China, since 1979, has attempted to promulgate a variety of laws directed at supporting and encouraging foreign investment in China. China has met with limited success, however, in reviving the original enthusiasm of foreign investment in that country. To many foreign investors, this smattering of new laws represents little more than a promising, colorful exterior of an edifice of a legal framework that lacks a solid foundation to support such a structure.

### 3. THE EVOLUTION OF CHINA'S EQUITY JOINT VENTURE LAW IN AN EFFORT TO ACCOMMODATE THE WESTERN INVESTOR

There are three principal methods of direct foreign investment in China.<sup>52</sup> These include the equity joint ven-

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<sup>47</sup> The Provisions of the State Council of the People's Republic of China for the Encouragement of Foreign Investment, promulgated by the State Council and effective October 11, 1986 [hereinafter Encouragement Provisions].

<sup>48</sup> Armstrong, *supra* note 18, at 72.

<sup>49</sup> *Id.*

<sup>50</sup> Moser, *supra* note 42, at 130.

<sup>51</sup> For a list of the benefits granted to export enterprises and technologically advanced enterprises, see *id.* at 130-32.

<sup>52</sup> Zhang, *supra* note 14, at 292-94. Other forms of direct foreign investment include compensation trade, processing and assembly, and lease financing. For a more in-depth discussion of these, see *id.* at 294.

ture ("EJV"), the contractual or cooperative joint venture ("CJV") and the wholly foreign-owned enterprise ("WFOE"). The focus herein is the EJV and its evolution; a detailed discussion of the CJV and the WFOE is beyond the scope of this Article. However, a better understanding of the EJV can be obtained by contrasting it to the CJV and the WFOE.

Briefly, the EJV is a limited liability company: the parties make capital contributions, either in cash or in kind; they share profits in proportion to those contributions; they establish a board of directors; they file articles of incorporation; and they pay taxes.<sup>53</sup> The EJV is considered one of the linchpins<sup>54</sup> of economic reform in China. A more complete discussion of the equity joint venture and its evolution will be presented below.

Unlike the EJV, the CJV existed in China as an approved form of foreign investment long before it was formally sanctioned under the 1988 Cooperative Joint Venture Law.<sup>55</sup> For several reasons, foreign investors generally regard this type of joint venture as affording a greater flexibility to the joint venture partners than does the EJV.<sup>56</sup> First, unlike the EJV, the CJV need not take on the identity of a separate legal entity. This allows the joint venture partners to maintain their respective identities as separate legal persons.<sup>57</sup> Secondly, CJVs are subject to fewer legal restrictions than the EJVs.<sup>58</sup> Thirdly, in contrast to the EJV arrangement, CJV partners share profits from the joint venture in accordance with the terms of their contract, and not according to the proportion of their respective capital contributions.<sup>59</sup> A similarity between the EJV and the CJV, however, is that the CJV foreign partner will most likely contribute capital, advanced technology or equipment and materials, while the Chinese joint venture partner will likely be the contributor of

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<sup>53</sup> Easson, *supra* note 34, at 151.

<sup>54</sup> Sang & Wilson, *supra* note 2, at 511.

<sup>55</sup> Easson, *supra* note 34, at 152. Law of the People's Republic of China on Chinese-Foreign Cooperative Joint Ventures, *adopted by* The First Session of the Seventh National People's Congress, Apr. 13, 1988.

<sup>56</sup> Feinerman, *supra* note 36, at 831.

<sup>57</sup> Zhang, *supra* note 14, at 293.

<sup>58</sup> Feinerman, *supra* note 36, at 831.

<sup>59</sup> *Id.*

in-kind contributions, such as the use of land, natural resources and labor.<sup>60</sup>

The law recognizing the existence of WFOEs was promulgated in 1986.<sup>61</sup> However, WFOEs, like the CJVs, were in existence as an approved form of foreign investment in China long before 1986. The WFOE began as an experiment of sorts in the Special Economic Zones (the "SEZs") situated in the southern part of China.<sup>62</sup> The WFOE perhaps represents tolerance of capitalism in China in the extreme. It is an entity organized solely by a foreign company that (i) contributes the entire equity required for its operation, (ii) enjoys the entire profit of the enterprise and (iii) manages the enterprise in a manner unassisted by a local partner.<sup>63</sup> This form of foreign investment in China is undoubtedly the least favored by the Chinese, since there is no transfer of technology to a Chinese enterprise and there is no training of management skills for a Chinese enterprise or its workers.<sup>64</sup> The WFOE, however, is considered a Chinese legal person and, therefore, subject to Chinese law.<sup>65</sup>

Due to the lack of Chinese involvement, creation of the WFOE is restricted to those operations which the Chinese government deems beneficial to the country's economy and those that utilize advanced technology and equipment in their operations.<sup>66</sup> Further, most or all of the products which are the fruits of the WFOE must be exported, and therefore constitute a source of foreign exchange so badly needed in China.<sup>67</sup>

The EJV, the CJV and the WFOE are the current mainstay of direct foreign investment in China. In varying degrees, each allows the foreign investor the opportunity to enjoy the

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<sup>60</sup> Zhang, *supra* note 14, at 293.

<sup>61</sup> *Round-Table Report*, *supra* note 1, at 61. Law of the People's Republic of China on Wholly Foreign-Owned Enterprises, *adopted by* The Fourth Session of the Sixth National People's Congress, Apr. 12, 1986 [hereinafter WFOE Law].

<sup>62</sup> *Round-Table Report*, *supra* note 1, at 61. See also Feinerman, *supra* note 36, at 831.

<sup>63</sup> *Round-Table Report*, *supra* note 1, at 61.

<sup>64</sup> *Id.*

<sup>65</sup> Zhang, *supra* note 14, at 293. WFOE Law, *supra* note 61, art. 4.

<sup>66</sup> Zhang, *supra* note 14, at 293. WFOE Law, *supra* note 61, art. 3.

<sup>67</sup> *Round-Table Report*, *supra* note 1, at 61.

benefits and burdens of operating an enterprise in China. The discussion will now turn to that enterprise which is the focus of this Article, the EJV.

### 3.1. *The 1979 Equity Joint Venture Law and the 1983 Regulations*

China's JV Law has evolved in a rather piecemeal fashion. The JV Law was well-received in terms of the new liberalism it expressed by China for foreign investment on that nation's soil. The initial reaction was one of great enthusiasm for this newfound access to China's resources. As laws go, however, it was widely regarded as little more than enabling legislation.<sup>68</sup> Thus, the early sentiment soon gave way to the reality that the 1979 Law suffered from being so skeletal and vague<sup>69</sup> that it left the foreign investment community devoid of any real certainty in its investment in China. China has clarified and amended the JV Law in response to declining foreign investment after the initial enthusiasm among the foreign investment community upon its passage in 1979.

The 1979 Law itself comprised fifteen short articles, and there was precious little elaboration of the respective subjects discussed within each article. For example, the 1979 Law employed the use of terms, such as "profits,"<sup>70</sup> which had no meaning in the context of Chinese domestic law, which is based on socialistic principles. Further, China's domestic law, what little existed in written form, was not capable of supplementing the capitalistic notions in the 1979 Law. That is, the domestic law of China did not provide a legal framework, upon which a foreign investor could rely, that would govern the

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<sup>68</sup> Brickley, *supra* note 6, at 258 (citing Jerome Alan Cohen et al., *China's New Joint Venture Law*, in *A NEW LOOK AT LEGAL ASPECTS OF DOING BUSINESS WITH CHINA*, 195, 197 (Howard M. Holtzmann & Walter Sterling Surrey eds., 1979)); Brian G. Brunsvold & Betty D. Battle, *The Prospects of Joint Ventures in China*, 79 *PAT. & TRADEMARK REV.* 3, 6 (1981); Tao Tai Hsia & Elizabeth Haun, *China's Joint Venture Law: Part I*, 1 *CHINA L. REP.* 5, 10 (1980).

<sup>69</sup> Brickley, *supra* note 6, at 259. Some would claim that this vagueness is deliberate and an excuse for the Chinese government to retain a great deal of control over the enterprise. See *id.* at n.7 for a discussion of this and some other possible reasons for this vagueness in the JV Law.

<sup>70</sup> See, e.g., JV Law, *supra* note 5, art. 4.

<https://scholarship.law.upenn.edu/jil/vol14/iss1/1>

investment and provide some business predictability.<sup>71</sup> Consequently, until 1983, the foreign investor was left to interpret and to rely solely upon the 1979 Law.

In 1983, China promulgated regulations to the JV Law (the "1983 Regulations")<sup>72</sup> were designed to address the deficiencies in the 1979 Law. The 1983 Regulations comprised 118 articles, which are divided into sixteen chapters. In many ways, the 1983 Regulations clarified some points of confusion and uncertainty for foreign investors in China.

The dual purpose of the JV Law, according to Article 1, is to expand international cooperation and technological exchange.<sup>73</sup> The 1979 Law allows the creation of those joint ventures that "promote the development of China's economy and the raising of scientific and technical levels."<sup>74</sup> Elaborating on this language, the 1983 Regulations state that such joint ventures must fit within one or more of the following categories of industry: (1) energy development, building material, chemical, and metallurgical industries; (2) machine manufacturing, instrument or meter manufacturing, and offshore oil exploitation equipment manufacturing industries; (3) electronics, computer, and communications equipment manufacturing industries; (4) textile, foodstuffs, medicine, medical apparatus, and packaging industries; (5) agriculture, animal husbandry, and fish breeding industries; and (6) tourism and service trades.<sup>75</sup>

In addition, the first article of the JV Law requires that all joint ventures in China be based on the principle of equality and mutual benefit.<sup>76</sup> This is the overriding concept in this law, a *jus cogens* of sorts, such that an equity joint venture

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<sup>71</sup> Brickley, *supra* note 6, at 259. Fundamental to certainty in conducting one's business in the Western world is resort to company or corporation law of a country. To date, China has not adopted such a law. Feinerman, *supra* note 36, at 831.

<sup>72</sup> Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, adopted Sept. 20, 1983, *translated in* 22 I.L.M. 1033 (1983) [hereinafter 1983 Regulations].

<sup>73</sup> JV Law, *supra* note 5, art. 1.

<sup>74</sup> 1983 Regulations, *supra* note 72, art. 3.

<sup>75</sup> Sang & Wilson, *supra* note 2, at 517. 1983 Regulations, *supra* note 72, art. 3.

<sup>76</sup> JV Law, *supra* note 5, art. 1.

that breaches this principle will be disallowed.<sup>77</sup> China maintains a particular sensitivity in this regard, since historically it perceived its treatment by other nations as being less than equal and as a country to be exploited.<sup>78</sup> By its terms, Article 1 of the JV Law also suggests that Chinese individuals are not permitted to invest in an equity joint venture. It states that only "Chinese companies, enterprises or other economic entities"<sup>79</sup> are permitted to engage in joint venture activities.<sup>80</sup>

Consistent with the principle of equality and mutual benefit, Article 4 of the 1983 Regulations indicates that a joint venture will be permitted to exist only if it meets one of the following requirements: (1) it must employ advanced technology and adopt modern, scientific management methods that increase the variety of products produced, raise quality and quantity of the products produced, and conserve energy and materials; (2) it must provide benefits of technical innovation which result in increased profits for decreased investment; (3) it must enable an expanded production of exportable products and result in the generation of increased foreign exchange income; or (4) it must provide for the training of technical and management personnel.<sup>81</sup> Because the joint venture in China is considered to be a Chinese legal person,<sup>82</sup> it is subject to the jurisdiction, and enjoys the protections, of Chinese law.<sup>83</sup> One of those protections is contained in Article 2 of the 1979 Law, which embodies the promise by the Chinese government to protect the investment and profits of the foreign joint venture partner.<sup>84</sup> This provision is regarded by the foreign investment community as a tacit promise to the foreign investor that its investment in China will not be expropriat-

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<sup>77</sup> Sang & Wilson, *supra* note 2, at 518. See 1983 Regulations, *supra* note 72, art. 5.

<sup>78</sup> See *supra* note 12 and accompanying text.

<sup>79</sup> JV Law, *supra* note 5, art. 1.

<sup>80</sup> Sang & Wilson, *supra* note 2, at 519.

<sup>81</sup> Sang & Wilson, *supra* note 2, at 517-18. 1983 Regulations, *supra* note 72, art. 4.

<sup>82</sup> 1983 Regulations, *supra* note 72, art. 2.

<sup>83</sup> *Id.*

<sup>84</sup> JV Law, *supra* note 5, art. 2.



ed.<sup>85</sup> However, any discussion of notice by the government and adequate protection in the event of an expropriation, in the Western sense, is carefully dodged by the language of this article.<sup>86</sup> Even in light of the 1990 amendments to the 1979 JV Law, as discussed below,<sup>87</sup> the possibility of and attendant problems resulting from nationalization of the joint venture's assets are still chilling for the foreign investor in China. An amendment to the JV Law that codifies the Western concept of adequate protection may provide some assurance to the foreign investor. True comfort with the expropriation issue, however, will likely follow only after China demonstrates a track record of adherence to such an amendment.

Article 3 of the JV Law addresses the procedures for the establishment of the equity joint venture. At the very least, the process is cumbersome and time-consuming. In order to obtain initial government approval, the Chinese joint venture partner submits a project proposal and a feasibility study of the proposed joint venture.<sup>88</sup> A good deal of attention must be given to these documents, as they form the basis for the parties to "sell" the proposed joint venture<sup>89</sup> as beneficial to China's economy and as satisfying one of the above-mentioned justifications for the joint venture.<sup>90</sup> Upon receiving government approval, not itself a study in expediency,<sup>91</sup> the parties must prepare the requisite documents, which include a joint venture agreement, a joint venture contract and articles of association.<sup>92</sup>

Pursuant to Article 4 of the JV Law, once created, the joint

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<sup>85</sup> Walter Surrey et al., *Joint Ventures in China: The First Water Stop*, 21 TEX. INT'L L.J. 221, 225 (1986).

<sup>86</sup> Sang & Wilson, *supra* note 2, at 521. The Western, industrialized countries part ways with the developing countries of the world on this topic. In particular, with regard to what compensation should be paid in the event of nationalization of the enterprise, industrialized nations maintain that compensation must be prompt, adequate, and effective. Developing nations, on the other hand, insist that compensation should be "appropriate" for the situation, without regard to fair market value or the Western standard of compensation. *Id.*

<sup>87</sup> See *infra* notes 134-60 and accompanying text.

<sup>88</sup> 1983 Regulations, *supra* note 72, art. 9.

<sup>89</sup> Easson, *supra* note 34, at n.37.

<sup>90</sup> See *supra* note 81 and accompanying text.

<sup>91</sup> See *infra* notes 200-01 and accompanying text.

<sup>92</sup> See JV Law, *supra* note 5, art. 8.

venture takes the form of a limited liability company.<sup>93</sup> This same article requires the foreign joint venture partner to contribute at least 25% of the capital required for the operation of the proposed joint venture.<sup>94</sup> There is no ceiling set for the percentage of ownership enjoyed by the foreign partner thus, presumably, it could own up to 99% of the joint venture.<sup>95</sup> Further, the joint venture parties share profits, losses and risks in proportion to their respective contributions to the joint venture.<sup>96</sup>

Pursuant to Article 5 of the JV Law, the type of investment into the EJLV can take a variety of forms; it can be in cash, in kind, or in intangible assets.<sup>97</sup> Such intangible assets include technology or management skills. Presumably, the Chinese joint venture partner would prefer some mix of foreign contribution that would include intangible assets, such that the foreign partner's expertise is shared with its Chinese counterpart. Furthermore, the JV Law explicitly mandates that any technology or equipment that the foreign party contributes be "truly advanced and appropriate to China's needs."<sup>98</sup> This twin requirement may be a tall order, because in many industries advanced technology is not appropriate for China's needs. China is reluctant to admit that oftentimes appropriate, and not advanced, technology is the only technology conducive to suiting its needs. It seems that China would sooner send the message that it need not crawl before it walks as a developing nation than acknowledge that very status it now holds.

Among the approved forms of contribution, the Chinese joint venture partner may contribute the use of the land contemplated in the joint venture.<sup>99</sup> This contribution is for

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<sup>93</sup> *Id.* art. 4. See *supra* note 46 for China's statement of the attributes and responsibilities of a limited liability company.

<sup>94</sup> JV Law, *supra* note 5, art. 4.

<sup>95</sup> Sang & Wilson, *supra* note 2, at 528.

<sup>96</sup> JV Law, *supra* note 5, arts. 4, 7; 1983 Regulations, *supra* note 72, arts. 87, 88. However, the proportion of funds allocated for reserve, expansion, and employee bonuses and welfare is decided by the board of directors. 1983 Regulations, *supra* note 72, art. 87.

<sup>97</sup> JV Law, *supra* note 5, art. 5.

<sup>98</sup> *Id.*

<sup>99</sup> JV Law, *supra* note 5, art. 5; 1983 Regulations, *supra* note 72, arts. 25-

use of the land only, since land in China is either state- or collectively-owned, and is not subject to individual ownership.<sup>100</sup>

Article 6 of the JV Law addresses the organizational structure of the joint venture and its management. The joint venture is required to have a board of directors.<sup>101</sup> The board is the highest authority of the entity, and is vested with decision-making power over all major questions.<sup>102</sup> The board of directors must comprise one chairperson, one or two vice chairpersons, and at least three directors.<sup>103</sup> Under the JV Law and the 1983 Regulations, the chairperson was appointed by the Chinese joint venture partner and thus was usually a Chinese national, and the vice chairperson was appointed by the foreign joint venture partner.<sup>104</sup> This mandate often translated into the unappealing situation in which the foreign joint venture partner would own majority control in the joint venture, without the ability to have its representative be chairperson of the board. This was widely regarded as a glaring contradiction to accepted international practice, which holds that the largest investor is entitled to selection or appointment of the chairperson of the board.<sup>105</sup>

Next, the joint venture in China must also have a management office responsible for the daily operations of the entity.<sup>106</sup> These management positions may be held by either Chinese or foreign nationals.<sup>107</sup>

Article 7 of the JV Law addresses taxes and the distribution of profits of the joint venture. The net profits of the joint venture are distributed to the joint venture parties in accordance with their respective contributions to the entity, after the payment of income taxes and after any board-authorized

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<sup>100</sup> Sang & Wilson, *supra* note 2, at 530.

<sup>101</sup> JV Law, *supra* note 5, art. 6.

<sup>102</sup> 1983 Regulations, *supra* note 72, art. 33.

<sup>103</sup> *Id.* art. 34.

<sup>104</sup> JV Law, *supra* note 5, art. 6; 1983 Regulations, *supra* note 72, art. 34. This rule was liberalized by the 1990 amendments to the JV Law. See *infra* notes 148-51 and accompanying text.

<sup>105</sup> Sang & Wilson, *supra* note 2, at 532.

<sup>106</sup> 1983 Regulations, *supra* note 72, art. 38.

<sup>107</sup> *Id.* art. 40.

reinvestment into the joint venture.<sup>108</sup> Joint ventures in China are taxed in accordance with the Joint Venture Income Tax Law.<sup>109</sup> This tax law provides for a basic thirty percent joint venture income tax, to which there is added a local surtax.<sup>110</sup> However, additional tax incentives exist for locating the joint venture in one of the Special Economic Zones, where taxes on the joint venture will be reduced to fifteen percent.<sup>111</sup> Other tax incentives also exist under the Encouragement Provisions, and eligibility depends upon whether the joint venture is considered export-oriented or technologically advanced.<sup>112</sup>

Importantly, under the pre-amended JV Law, Article 8 required the joint venture to maintain an account with the Bank of China or at a bank approved by the Bank of China.<sup>113</sup> Under this same article, the joint venture is required to be insured by Chinese insurance companies.<sup>114</sup>

Article 9 of the JV Law concerns the operations of the joint venture. A key part of this article is the strong suggestion that the joint venture "should give first priority" to sourcing the entity's operations with Chinese materials.<sup>115</sup> The joint venture may obtain materials from outside the PRC, but should only do this when the needed materials are of better quality than those available in China or are manufactured with advanced technology unavailable in China.<sup>116</sup> Further, the 1983 Regulations strongly encourage the joint venture to export its products for sale on the international market, thus generating foreign exchange.<sup>117</sup>

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<sup>108</sup> Sang & Wilson, *supra* note 2, at 534. JV Law, *supra* note 5, art. 7.

<sup>109</sup> Income Tax Law of the People's Republic of China concerning Joint Ventures Using Chinese and Foreign Investment, *adopted by* The Third Session of the Fifth National People's Congress, Sept. 10, 1980.

<sup>110</sup> *Id.* art. 3. Sang & Wilson, *supra* note 2, at 536.

<sup>111</sup> Easson, *supra* note 34, at 159.

<sup>112</sup> *Id.* Encouragement Provisions, *supra* note 47.

<sup>113</sup> Surrey et al., *supra* note 85, at 225. This provision has been changed, pursuant to the 1990 Amendments to the JV Law. *See infra* notes 152-54 and accompanying text.

<sup>114</sup> JV Law, *supra* note 5, art. 8.

<sup>115</sup> *Id.* art. 9.

<sup>116</sup> Sang & Wilson, *supra* note 2, at 539.

<sup>117</sup> 1983 Regulations, *supra* note 72, art. 60. A distinct tension exists here given the sometimes divergent goals of the Chinese and foreign joint

Articles 10 and 11 of the JV Law address the problem of remittance of capital earned by the joint venture. Both the foreign joint venture partner and the individual foreign employees of the joint venture may remit their earned foreign exchange outside of the PRC.<sup>118</sup> As discussed below, however,<sup>119</sup> under the current regime of foreign currency control in China, foreign currency is freely convertible into the Chinese *renminbi*, but *renminbi* is not itself a freely convertible currency.<sup>120</sup> This situation has led to creative structuring of transactions, such as a barter or counter-trade arrangement, which allows the foreign parties to realize the benefits of their investments.<sup>121</sup>

The term of the joint venture in China has been another point of contention for foreign investors, and is addressed in Article 12 of the JV Law. This article did not specify a specific term for the joint venture, but did require a finite term.<sup>122</sup> The standard term for a joint venture in China was ten to fifteen years, although a term of thirty years or greater was possible under the 1983 Regulations if the joint venture involved a large investment, a long period of construction and low interest rates on funds.<sup>123</sup> The potential term of a joint venture in China was extended by a 1986 amendment to the 1983 Regulations, allowing such joint ventures to continue for a term of fifty years, and possibly longer, with the approval of the State Council.<sup>124</sup> The term of the joint venture must be stipulated in the joint venture contract and articles of association, and any extension of the term is subject to approval by the appropriate Chinese authority.<sup>125</sup> Not surprisingly, this arrangement has had a chilling effect on foreign investors, who may understandably regard the invitation to invest in China

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venture partners. *See, e.g., infra* notes 169-73 and accompanying text.

<sup>118</sup> JV Law, *supra* note 5, arts. 10, 11.

<sup>119</sup> *See infra* notes 161-68 and accompanying text.

<sup>120</sup> Sang & Wilson, *supra* note 2, at 540.

<sup>121</sup> *See, e.g., infra* notes 166-68 and accompanying text.

<sup>122</sup> JV Law, *supra* note 5, art. 12. *See also* Sang & Wilson, *supra* note 2, at 541.

<sup>123</sup> 1983 Regulations, *supra* note 72, art. 100.

<sup>124</sup> *Id.* as amended in 1986. *See also* Matthew D. Bersani, *Some P.R.C. Joint Ventures Granted Unlimited Terms*, 12 EAST ASIAN EXEC. REP. 9, 9 (1990).

<sup>125</sup> 1983 Regulations, *supra* note 72, art. 101.

as a tentative one. This issue was specifically addressed in the later amendments to the 1979 Law, as discussed below.<sup>126</sup>

Article 13 of the JV Law governs the termination of the joint venture. When the joint venture is terminated, the board of directors is typically required to apply to the appropriate Chinese authority for dissolution of the joint venture.<sup>127</sup> If termination is approved, a liquidation committee is established to oversee the distribution of surplus earnings, after the extinguishment of all debts and obligations, in a manner proportionate to the parties' respective contributions to the entity.<sup>128</sup>

The avenues for dispute resolution set forth in Article 14 of the 1979 Law have been expanded by the 1983 Regulations. In the well-known Chinese tradition, the 1979 Law emphasizes the informal, face-saving methods of dispute resolution: consultation, conciliation and arbitration.<sup>129</sup> Resort to these methods over litigation had the advantage, from the Chinese perspective, of allowing for a resolution of the dispute without labelling one party the winner, and the other, a loser.

The 1983 Regulations, however, adopt somewhat of a more Western practice of dispute resolution. The 1983 Regulations provide that disputes should be resolved "through friendly consultation or mediation" as a first resort.<sup>130</sup> Only if these attempts fail should the parties resort to arbitration or litigation to settle the matter.<sup>131</sup> The hierarchical nature of these options suggests strong adherence by the Chinese to their preference for non-confrontational dispute resolution techniques. Not surprisingly, however, while accommodating the Western investor by finally allowing the possibility of litigation, the Chinese did not go so far as to allow that litigation to take place in foreign courts. Instead, the 1983 Regulations specifically provide for resort to the courts of China.<sup>132</sup> Article 15 of the JV Law gives as its effective date

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<sup>126</sup> See *infra* notes 155-58 and accompanying text.

<sup>127</sup> 1983 Regulations, *supra* note 72, art. 102.

<sup>128</sup> 1983 Regulations, *supra* note 72, arts. 103-106. Easson, *supra* note 34, at 160.

<sup>129</sup> JV Law, *supra* note 5, art. 14.

<sup>130</sup> 1983 Regulations, *supra* note 72, art. 109.

<sup>131</sup> *Id.*

<sup>132</sup> 1983 Regulations, *supra* note 72, art. 111.

July 8, 1979, the date of its promulgation.<sup>133</sup>

The purpose of the 1983 Regulations was to amplify the rather skeletal introduction of international joint ventures in China that the JV Law of 1979 announced. However, for the reasons explained above, even these implementing regulations to the JV Law left the foreign investment community less than satisfied that China had made a heartfelt commitment to its presence on Chinese soil. In response to this sentiment, China amended the JV Law in 1990.

### 3.2. *The 1990 Amendments*

As discussed above, while the 1983 Regulations to the 1979 Law provided some guidance with regard to the original 15 articles, foreign investment in China still failed to increase dramatically. China realized it needed to improve its joint venture law further to make joint ventures in China more attractive to foreign investors, and did this by amending the law in April 1990.<sup>134</sup> Specifically, with these amendments (the "1990 Amendments") came substantive change in nine articles of the JV Law.<sup>135</sup>

The first amendment to the 1979 Law adds a new paragraph to Article 2 that embodies a promise by the PRC "not to nationalize or requisition any equity joint venture," while at the same time, it reserves the right to do so for a "public purpose" in accordance with established "legal procedures" and the payment of "appropriate compensation."<sup>136</sup> The Chinese probably believe these provisions put teeth into the former version of the law. However, from the perspective of the foreign joint venturer, the amendment simply gives lip service to Western notions of expropriation, which would require the demonstration of a public purpose, and only then with

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<sup>133</sup> JV Law, *supra* note 5, art. 15.

<sup>134</sup> Amendments to the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, *adopted by the Third Session of the Seventh National People's Congress*, Apr. 4, 1990 (effective Apr. 4, 1990) [hereinafter 1990 Amendments].

<sup>135</sup> The amendments were to articles 2, 3, 6, 7, 8, 10, 11, 12 and 13 of the 1979 JV Law, *supra* note 5. See also Dario F. Robertson & Xiaokang Chen, *New Amendments to the Chinese Equity Joint Venture Law: Will They Stimulate Foreign Investment?*, 18 INT'L BUS. LAW. 372, 372 n.1 (1990).

<sup>136</sup> 1990 Amendments, *supra* note 134, art. 2. See also Robertson and Chen, *supra* note 135, at 373.

adequate compensation. The use of the term "appropriate compensation," as opposed to "adequate compensation," is an important distinction about which the Chinese undoubtedly thought carefully.<sup>137</sup> In lesser developed countries, the requirement of "appropriate compensation" essentially gives the government a license to employ any measure it finds suitable for the valuation of an enterprise.<sup>138</sup> "Adequate compensation," on the other hand, denotes the award of fair market value for the enterprise under the circumstances.<sup>139</sup> In short, there is no known standard under Chinese law<sup>140</sup> that lends predictability by which the foreign investor can judge just how the Chinese will effectuate this amendment in practice.

At best this amendment to Article 2 of the 1979 Law represents a show of good faith,<sup>141</sup> and does little to alleviate the fears of foreigners who are well aware that China can reverse this policy or simply pass superseding legislation.<sup>142</sup> The fact that a public purpose must be found provides little safeguard against such action by the PRC, since this requirement is not a difficult one for any government to fulfill. Perhaps the only real safeguard to the nationalization of foreign enterprises in China is the harsh response that would follow any such action. In short, a nationalization of the joint venture would result in the immediate cessation of operations of the enterprise, thereby impeding the flow of foreign exchange so coveted by China.<sup>143</sup> Moreover, such action would quickly send a very negative message to the investment world, thereby further impeding the realization of China's goals of economic reform.

A second amendment to the JV Law formally recognizes a change in the contract approval process. This change had already taken place in practice as a corollary to the decentralization of government functions since the promulgation of the

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<sup>137</sup> See *supra* note 86 and accompanying text.

<sup>138</sup> Robertson & Chen, *supra* note 135, at 750.

<sup>139</sup> *Id.*

<sup>140</sup> Ning Zhu, *The New Amendments to the Equity Joint Venture Law Are Not a Cure-All*, CORP. COUNSEL'S INT'L ADVISER, Aug. 1990, at 63-06, 63-09.

<sup>141</sup> See, e.g., Robertson & Chen, *supra* note 135, at 373.

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., *id.*



JV Law in 1979.<sup>144</sup> Unamended Article 3 had previously identified the Foreign Investment Commission as the arm of the government with authority to approve joint venture contracts.<sup>145</sup> Amended Article 3 requires that such contracts be submitted to the "State department concerned with foreign economic relations and trade."<sup>146</sup> By transferring the approval authority, the PRC recognizes that the economic reform in China is one that is somewhat decentralized, with such decentralization resulting in a multi-layered approval process.<sup>147</sup>

Next, Article 6 of the JV Law has been amended in an attempt to maintain pace with Western practices concerning the board of directors of an enterprise. Specifically, amended Article 6 now permits the foreign investor to appoint a foreigner as chairperson of the board of directors.<sup>148</sup> The amendment to Article 6 further provides that the vice chairperson of the board be selected by the joint venture partner that did not appoint the chairperson.<sup>149</sup> This change does bring the joint venture in China more in step with Western business practices. Its practical impact, however, may be rather limited in the sense that the chairperson of the board can be relegated to a figurehead who cannot act unless specifically authorized by the board of directors in full.<sup>150</sup> In some instances, however, this amendment could have a real impact in that the joint venture agreement often gives the chairperson the power to cast the tie-breaking vote in instances of deadlock.<sup>151</sup> In any case, being able to appoint the chairperson is important to some foreign joint venturers, and this change will factor positively into their decision regarding whether to locate in China.

An amendment to Article 8 eliminates the former require-

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<sup>144</sup> *Id.*

<sup>145</sup> JV Law, *supra* note 5, art. 3. Robertson & Chen, *supra* note 135, at 373.

<sup>146</sup> 1990 Amendments, *supra* note 134, art. 3. Robertson & Chen, *supra* note 135, at 373.

<sup>147</sup> Robertson & Chen, *supra* note 135, at 374.

<sup>148</sup> 1990 Amendments, *supra* note 134, art. 6.

<sup>149</sup> *Id.* Robertson & Chen, *supra* note 135, at 374.

<sup>150</sup> Robertson & Chen, *supra* note 135, at 374.

<sup>151</sup> Zhu, *supra* note 140, at 63-08.

ment that the EJV open a foreign exchange account with the Bank of China or a bank approved by that bank.<sup>152</sup> The practical effect of this amendment remains in doubt, however, because it does not grant real freedom to the joint venture partners to select the bank of their choice at which to open a foreign exchange account.<sup>153</sup> Under the amended Article 8, the joint venture may open its foreign exchange account at "a bank or any other financial institution which is authorized by the State Administration of Foreign Exchange Control . . . ."<sup>154</sup> The same government interference with this selection exists since, pursuant to either the original 1979 Law or the amended 1990 text, the Chinese government, and not the joint venture parties, ultimately decides which banks are eligible for such deposits.

The amendment to Article 12 addresses the problem of the limited term allowed for the joint venture on Chinese soil. Though Article 12 of the 1979 Law did not specifically limit the term for joint ventures, the regulations implementing that law did.<sup>155</sup> The wording of amended Article 12 does not differ greatly from that of the old text; both essentially allow the term of the joint venture to be determined by the partners.<sup>156</sup> This amendment, however, is regarded as having greater implications not for what it says, but for what it does not say. By its silence as to term limitations, this amendment appears to repeal the earlier regulations, which contained maximum terms for the joint venture.<sup>157</sup> This, of all the amendments, probably has the most significance because the ability of the joint venture to operate indefinitely signals a tremendous tolerance on the part of the Chinese for foreign investment in their land.

One should not, however, be lulled into believing that every joint venture will automatically be granted an existence in China in perpetuity.<sup>158</sup> Indeed, those foreign investors who are allowed to stay indefinitely will be selected, and their

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<sup>152</sup> 1990 Amendments, *supra* note 134, art. 8.

<sup>153</sup> Robertson & Chen, *supra* note 135, at 374.

<sup>154</sup> 1990 Amendments, *supra* note 134, art. 8.

<sup>155</sup> See *supra* notes 122-24 and accompanying text.

<sup>156</sup> Robertson & Chen, *supra* note 135, at 374.

<sup>157</sup> *Id.*

<sup>158</sup> Zhu, *supra* note 140, at 63-08.

investment dollars will be the ones channeled towards the industries that the Chinese covet most in their plan for economic reform.

While these amendments<sup>159</sup> to China's joint venture law are modest from the perspective of the foreign investor, at the very least they demonstrate China's awareness that the initial romance of investing in China had been replaced by grave skepticism. This skepticism, coupled with the Tiananmen Square incident that allowed the world to witness the violent suppression of the democratic movement afoot in China,<sup>160</sup> nearly sounded the death knell for new foreign investment in China. The 1990 Amendments are a step in the right direction to resuscitate the thinking, outside of China, that foreign investment in China has advantages that outweigh the disadvantages. However, further change is still needed. Specifically, change must come in the form of legislation that addresses the real concerns of foreign investors: predictability in the law and security of investment.

#### 4. LINGERING PROBLEMS FOR WESTERN INVESTORS IN CHINA

Despite China's attempts, through the 1983 Regulations and the 1990 Amendments, to satisfy the foreign investment community that investment in China will be both beneficial and secure, many problems still exist. Indeed, most of these problems are a natural outgrowth of the fact that the Chinese and the foreign joint venture partner often harbor quite divergent goals and expectations for the joint venture. The most prevalent of these problems will be discussed in this section.

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<sup>159</sup> The 1990 Amendments also made a few "housekeeping" changes in the equity joint venture law. These include (1) an amendment to Article 7 replacing a provision giving joint ventures employing "up-to-date technology" certain tax benefits, with new language providing that an equity joint venture may enjoy any tax benefits for which it qualifies under the tax laws; and (2) an amendment to Article 13 that deletes the reference to the "Foreign Investment Commission" as outdated. 1990 Amendments, *supra* note 134, arts. 7, 13. Robertson & Chen, *supra*, note 135, at 374.

<sup>160</sup> Lena H. Sun, *Carter Presses China to Free '89 Prisoners; Blunt Speech Delivered at Beijing Envoy School*, WASH. POST, Apr. 15, 1991, at A11.

#### 4.1. Foreign Exchange Restrictions

One of the most difficult hurdles for the foreign investor in China to overcome is the very restrictive foreign exchange policy. Because foreign exchange is scarce in China and because China's program for economic reform depends on foreign exchange, the Chinese employ two key principles with respect to its foreign exchange reserves: centralized control and "self-balance."<sup>161</sup> The former principle speaks for itself. Control over foreign exchange will not devolve to the provincial and local levels, as may some controls in the era of economic reform.

The "self-balance" principle involves the joint venture achieving a balance between its foreign exchange receipts and expenditures.<sup>162</sup> To do this, the joint venture must export the better part of its entire production to generate the requisite foreign exchange.<sup>163</sup> This is desirable from the perspective of the Chinese joint venture partner, assuming the products are of a quality to compete in the world market. However, one of the primary enticements to outsiders of investing in China is to tap the tremendous number of potential consumers in the Chinese market.

This problem is exacerbated by the fact that the joint venture needs foreign exchange at each stage of the venture. It requires foreign exchange at (i) the start up stage, to purchase the necessary equipment and technology, (ii) throughout the entire production stage, to purchase the imported inputs it cannot source locally, and (iii) at the interim final stages, when it must repatriate profits to the

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<sup>161</sup> Zhang, *supra* note 14, at 314. These two principles can be traced to the Provisional Regulations on Foreign Exchange Control of the People's Republic of China, arts. 3,5 (promulgated December 18, 1980 by the State Council) and various economic laws pertaining to direct foreign investment in China. See *id.* at n.56.

From 1986 forward, several regulations have been promulgated in the PRC to alleviate some of the problems caused by the foreign exchange crisis in China. These include the Regulations of the State Council on Joint Venture's Balance of Foreign Exchange Revenue and Expenditure, the Measures for Substitution of Importation with Products of Chinese-Foreign Equity and Contractual Joint Ventures, and the Measures for Foreign Investment Enterprises Purchasing Domestic Products for Export to Achieve Balance of Foreign Exchange Receipts and Expenditures. *Id.* at 314.

<sup>162</sup> *Id.* at 314.

<sup>163</sup> *Id.*

foreign investor.<sup>164</sup> Moreover, the promise by the Chinese government in the 1983 Regulations that it would assist joint ventures that produce for sale on the domestic market has revealed itself as an empty one.<sup>165</sup>

The problem is not an easy one to dodge, but various mechanisms have been used to obtain some relief from China's foreign exchange policy. Typical strategies employed to combat this problem involve either planning to manufacture products for export or attempting to target China's import needs and manufacturing with an eye towards import substitution.<sup>166</sup> Others make use of the profit swap centers, where a joint venture may swap its profits, in *renminbi*, with those in foreign currency earned by an enterprise which has enjoyed a foreign currency surplus.<sup>167</sup> Another useful technique to achieve a foreign exchange balance is the compensation trade arrangement. With this strategy, there is an agreement whereby an enterprise invests its foreign currency in a joint venture in China in return for products which will be used by that enterprise's operations in China or elsewhere.<sup>168</sup> Also, a barter or counter-trade arrangement could be employed to exchange goods for goods, services for services, or some combination of the two. While these methods help alleviate the sting of the foreign exchange shortage in China, they do not eliminate it altogether. This is an area that China most certainly should address if it wants to breathe new life into its program of economic reform.

#### 4.2. Market Access to the Chinese Consumer

One area where the incongruence of fundamental goals of the Chinese and foreign joint venture partners is most pronounced involves access to China's consumer market. Article 60 of the 1983 Regulations encourages joint ventures to sell their products on the international market.<sup>169</sup> Indeed,

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<sup>164</sup> See, e.g., McKenzie, *supra* note 7, at 116.

<sup>165</sup> 1983 Regulations, *supra* note 72, art. 75. Feinerman, *supra* note 36, at 833.

<sup>166</sup> Sang & Wilson, *supra* note 2, at 540.

<sup>167</sup> Feinerman, *supra* note 36, at 833. See also Sang & Wilson, *supra* note 2, at 541.

<sup>168</sup> Sang & Wilson, *supra* note 2, at 540.

<sup>169</sup> 1983 Regulations, *supra* note 72, art. 60.

Article 61 of the 1983 Regulations permits joint ventures to sell their products on the domestic market only if China "urgently needs or imports" such goods.<sup>170</sup> This sets the stage for inherent tension between these two sets of investment partners.

What motivates foreigners to invest in China in the first place is, in principal part, the ability to gain access to this market of over one billion consumers.<sup>171</sup> The Chinese, however, place very restrictive parameters on access to the local consumer market, tolerating domestic sales only when China has a demonstrated need for the product or it imports the product. The heart of the problem here is that China's policy to encourage sales on the international market is inextricably bound with the problem of the foreign exchange crisis, discussed above.<sup>172</sup> Further, government approval is a prerequisite to selling in China's domestic market,<sup>173</sup> meaning the foreign joint venture partner will be subject to many restrictions it may not have contemplated when deciding whether to invest in China. A sure way to help revive interest in foreign investment in China would be for the Chinese government to relax the crippling restrictions on access to the Chinese consumer that are now in place. If this goal of reaching the domestic market continues to be frustrated, foreign investors will simply look to other nations without such restrictions to channel their investment dollars.

#### 4.3. *Unskilled Local Labor and Management*

Again, the incongruity of the goals of the Chinese and the foreign joint venture partners presents a fundamental problem in the area of developing labor and management skills. This problem is multi-faceted. For reasons deeply rooted in culture and economic philosophy, the Chinese labor force has traditionally not been very efficient or productive. In short, the capitalistic notion of "more work, more pay"<sup>174</sup> has never played a role in the Chinese work force. Further, much of the

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<sup>170</sup> *Id.* art. 61.

<sup>171</sup> *Round-Table Report*, *supra* note 1, at 6.

<sup>172</sup> *Id.* See *supra* notes 161-68 and accompanying text.

<sup>173</sup> Feinerman, *supra* note 36, at 833.

<sup>174</sup> Golden, *supra* note 20, at 405.

Chinese work force either lacks the necessary training, or has been trained but lacks on-the-job experience.<sup>175</sup> The 1979 Law remained silent on the topics of labor quality and wage rates.<sup>176</sup>

The 1983 Regulations half-heartedly addressed some of the problems in this area, but did not go far enough. Granted, the 1983 Regulations introduced the notions of labor-management relations,<sup>177</sup> the participation of trade unions in the operations of the joint venture,<sup>178</sup> and the salary bonus system.<sup>179</sup> These concepts, however, rooted in Western labor law, are without foundation in Chinese business operations. In this regard, the reality for foreign investors was not changed very much by the 1983 Regulations. For example, that reality included management's inability to discharge employees who performed poorly, with the exception of labor regulations in the SEZs, which allowed for the discharge of employees in such instances.<sup>180</sup>

Where management is concerned, the warring goals of the two joint venture partners plant a seed for ready conflict. The foreign joint venture partner will want to staff the venture with foreign management personnel in whom it has confidence. This is juxtaposed with the fact that, not surprisingly, the local joint venture partner, along with the local approval authorities, will want Chinese nationals to staff the management in the joint venture and thereby receive training in management skills. This training, which will remain with the individuals long after the joint venture is terminated, if that is its fate, is one of the principal incentives for the Chinese allowing foreign investment in China. Even when the foreign joint venture partner agrees to have local management for the enterprise, a common complaint of the foreign joint venture partner is that the local candidates for management come from a pool of rank and file of the Communist Party, where title and

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<sup>175</sup> Cecilia Wagner, *A Survey of Sino-American Joint Ventures: Problems and Outlook for Solutions*, EAST ASIAN EXEC. REP., Mar. 15, 1990, at 7, 9.

<sup>176</sup> Golden, *supra* note 20, at 405.

<sup>177</sup> 1983 Regulations, *supra* note 72, arts. 91-94.

<sup>178</sup> *Id.* arts. 95-99.

<sup>179</sup> *Id.* art. 93.

<sup>180</sup> Feinerman, *supra* note 36, at 835. For a more in-depth discussion of labor problems in China, see *id.* at 834-36.

status are stressed over actual performance.<sup>181</sup>

This is certainly one area where some sacrifice is required, most probably on the part of the foreign investor. It must simply acknowledge that a key reason for China's openness to foreign investment is the hope that some of its population will become so trained. One way, albeit a slow one, to accommodate both sets of interests is to find local workers with management potential and take the time to train them, either on-site or at a United States facility.<sup>182</sup> To obtain the benefits of tapping China's resources and potential consumer market, the foreign joint venturer may have to compromise the efficiency to which it is so accustomed in a way that allows local management to be trained in the daily operations and responsibilities the joint venture requires. In this way, the foreign joint venture partner must prove that it too can project into the future for the long-term good of the enterprise, in the same manner that it expects the Chinese government to so project.

#### *4.4. Sourcing and Quality of Materials and Lack of Infrastructure*

Pursuant to Article 9 of the JV Law<sup>183</sup> and Article 57 of the 1983 Regulations,<sup>184</sup> a priority is to be given to Chinese sources of supply for the joint venture, all conditions being equal.<sup>185</sup> This presents several problems for the joint venture in that a "first priority"<sup>186</sup> for sourcing from Chinese materials exists, but all things are seldom equal. The fact is, supplies may be unpredictable,<sup>187</sup> prices may be unacceptable,<sup>188</sup> sourcing outside the locale of the joint venture operation may be difficult,<sup>189</sup> and quality may be so poor that even the Chinese joint venture partner may be resistant to

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<sup>181</sup> Wagner, *supra* note 175, at 8.

<sup>182</sup> *Id.*

<sup>183</sup> JV Law, *supra* note 5, art. 9.

<sup>184</sup> 1983 Regulations, *supra* note 72, art. 57.

<sup>185</sup> *Id.*; Moser, *supra* note 42, at 115.

<sup>186</sup> Zhang, *supra* note 14, at 302.

<sup>187</sup> *Id.*

<sup>188</sup> Wagner, *supra* note 175, at 9.

<sup>189</sup> *Id.*



source locally.<sup>190</sup>

Many of the above-mentioned problems in sourcing arise from the poor quality of the goods produced in China and the poor infrastructure within which local facilities must operate. Poor quality is attributable, in principal part, to the lack of quality control standards or regular inspections. In addition, there is generally a lack of incentive for doing good work.<sup>191</sup> The answer to this dilemma is to create incentives for good work performance (e.g., merit bonus systems) and to implement quality control standards and a viable system for monitoring compliance with those standards. One thing in this regard is certain—if China does not address this problem, its goods will remain unfit for the international marketplace.<sup>192</sup> This will surely frustrate the provisions governing joint ventures in China which are tailored towards joint venture production for export.

The quality-of-goods problem may be so intertwined with that of another, namely poor infrastructure, that an attempt at curing either problem can only go so far. The most aggravated infrastructure problems are in the areas of transportation, energy and communications. China has no real system for the efficient transportation of good and materials, leaving many inland resources completely inaccessible.<sup>193</sup> Many roads that do exist are in poor condition or unpaved altogether.<sup>194</sup> The railroad system in China is old and oversubscribed.<sup>195</sup> China's waterways tend to transport the vast majority of goods, but they themselves are so congested that ships can be at a standstill for weeks, if not months, before cargo is unloaded.<sup>196</sup> Power shortages are also a constant problem in China.<sup>197</sup> The problems in this area range from periodic power outages to simply no electricity whatsoever.<sup>198</sup> Finally, China has a poor communications system. Telephones

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Pelosi, *supra* note 24, at 107.

<sup>193</sup> Patrucco, *supra* note 16, at 637.

<sup>194</sup> *Id.*; see also Wagner, *supra* note 175, at 9.

<sup>195</sup> Patrucco, *supra* note 16, at 637.

<sup>196</sup> *Id.*

<sup>197</sup> Wagner, *supra* note 175, at 9.

<sup>198</sup> *Id.*

are a scarce commodity, and facsimile machines are practically non-existent, especially in remote areas of the country.<sup>199</sup> These problems are not easily rectified. China is a developing nation in a "catch-22" situation: on the one hand, it requires improvement in these areas to develop, while on the other hand, it does not have a surplus of funds to allocate towards improvements in these problem areas.

#### 4.5. *Government Approvals*

The joint venture law in China seems to be evolving in the direction of requiring more layers of government approvals, rather than fewer. The result is a web of "bureaucratism"<sup>200</sup> that is very unwelcoming for the foreign investor. The myriad of layers of government approvals necessary for the joint venture to even commence operations means that a ready investment can often remain idle for an indefinite period of time. Also, once operations finally begin, the Chinese government is ever-present to oversee the enterprise at every turn. At the very least, this situation creates a business-stifling<sup>201</sup> climate in which the foreign investor will find it difficult to function.

No relief is in sight on this front. Foreign investors wishing to take advantage of China's vast resources and potential consumer market may have to adopt a newfound tolerance for the pervasiveness of the government in its business operations, and just hope for improvement. The scenario of the Chinese government relaxing its grip on foreign investment within its borders any time soon is not a likely one, given China's deep-seated hesitancy to embrace the outside world.

#### 4.6. *The Need For Further Legislation Integrating the Equity Joint Venture into China's Legal Landscape*

Enough time has passed since the introduction of the joint venture law in China in 1979 to allow Chinese officials and foreign investors both to reflect on most of the drawbacks of

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<sup>199</sup> *Id.*

<sup>200</sup> Feinerman, *supra* note 36, at 834.

<sup>201</sup> Sang & Wilson, *supra* note 2, at 546.

investment in China from all perspectives. While China has amplified and changed its JV Law over time, many of the recurring problems have gone unaddressed altogether. There are no quick solutions, but the time to begin rejuvenating the former enthusiasm for foreign investment in China is now, if China does not want to see those limited investment dollars infiltrate, instead, the economies of its neighbors.

The answer lies beyond the continual and cosmetic shaping of laws to make China a more attractive investment venue. Future changes must be much more far-reaching than those of the past.<sup>202</sup> Since China has pronounced foreign investment as critical to its program of economic reform, it must continue to transform its foreign economic legislation in a direction that makes the environment more and more fertile and secure for such investment. Laws directed at foreign investment alone, however, will just make their present isolationist existence all the more pronounced.

In this vein, China must take concrete steps to integrate more fully the existing foreign economic laws with those of its domestic scheme. Unless this happens, foreign investment and the law supporting it will continue to operate, as they have thus far, in a vacuum. If China wants to recapture the foreign investment market, it must do more than mimic something resembling Western legal jargon in its foreign and domestic laws. First, China must begin to build a bona fide domestic legal regime that supports the foreign economic legal regime that is currently in place. For example, China could begin to address many of its domestic problems by creating laws and regulations aimed at allowing currency conversion or increasing productivity and the quality of goods. Then, China must fully integrate its foreign economic laws into this domestic legal regime. It must also provide real meaning for the protections that it promises, and demonstrate to the international investment community by way of action, and not just by way of words, its dedication to providing these protections. In short, it must provide an environment of predictability in the law and security of investment.

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<sup>202</sup> Robertson & Chen, *supra* note 135, at 375.

## 5. CONCLUSION

The commendable strides China has made to attract foreign investors to its border must not cease with the recent regulations and amendments to its joint venture law if China is truly to realize its potential for holding a dominant place on the international economic stage. While many problems still await the foreign investor in China, the equity joint venture remains a popular form of foreign investment. The structure of the equity joint venture lends itself to an equitable sharing of the profits, costs and risks of doing business in a foreign land.<sup>203</sup> At a time when foreign investors in China cannot be sure if the invitation of the last decade or so to invest in China is a standing one, or one to be withdrawn when its immediate purposes are served, the equity joint venture remains a good vehicle for risk allocation in China.

If China is at all sensitive to the fact that foreign investment there has been diminishing in recent years, it should concentrate on a next round of amendments or regulations to the joint venture law that provide real protections and security of investment in China. It should not stop at the four corners of the foreign investment laws, however, to achieve this security for foreign investors. Instead, China must integrate those foreign investment laws into a revised domestic legislative regime that supports those laws and the goals they seek to achieve.

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<sup>203</sup> Pelosi, *supra* note 24, at 95.